

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

SARAI SERVICES GROUP

Employer/Petitioner

and

Case 16-UC-223885

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 564**

Union

DECISION AND ORDER

The Petitioner, which employs a bargaining unit consisting of six employees Represented by the Union in Brownsville, Texas, contends that one of the employees should be excluded from the existing bargaining unit. Based on that contention, Petitioner seeks an order clarifying the unit that would remove from the Unit, the employee holding the job title “Secretary III.”

As set forth below, I find as a threshold issue that Petitioner has failed to meet its burden that there have been recent, substantial changes that justify the exclusion of a historically included position from the bargaining unit. I further find that, assuming *arguendo* the Petitioner made such a showing, Petitioner has failed to meet its burden in establishing that the Secretary III is a confidential employee.

The Petitioner filed a petition with the National Labor relations Board under Section 9(c) of the National Labor Relations Act. A hearing officer of the Board held a hearing, and the parties presented oral arguments at the conclusion of the hearing. During the hearing, Petitioner withdrew a portion of the petition seeking the exclusion of three of the four HVAC Mechanics included in the bargaining unit as statutory supervisors.

This decision will first provide an overview of the Petitioner’s operations and the parties’ bargaining history. I will then set forth the facts, legal standards, and reasoning which support my conclusion to be applied in resolving Petitioner’s request for clarification of the bargaining unit.

I. OVERVIEW OF OPERATIONS

Petitioner provides maintenance services at government facilities in the Brownsville, Texas, area under a contract with the General Services Administration. Petitioner assumed operations under this contract in February 2018. Prior to Petitioner assuming the maintenance services contract, Quality Services International, LLC (QSI) held this contract. QSI was preceded by AMF Mechanical Corp. (AMF).

II. BARGAINING HISTORY

As the result of a Board election, the Union was certified to represent a unit of employees working under the GSA contract in Brownsville and employed by AMF on May 22, 2007. The Union negotiated successive collective bargaining agreements with AMF and its successor, QSI. Upon assuming the contract, Petitioner agreed to adopt the collective bargaining agreement then in place between the Union and QSI, which was effective August 1, 2017 through September 30, 2018.

That agreement recognized the Union as the collective bargaining representative for a unit including all maintenance employees employed by Petitioner at Los Indios International Bridge, Los Tomates Border Station (Veterans Bridge), U.S. Court House Brownsville, Texas, Gateway Border Station, and B&M Border Station; and excluding all guards, professional employees, confidential employees and supervisors as defined in the National Labor Relations Act as amended. As discussed below, secretary positions, identified in various contracts as Secretary I, Secretary II, and Secretary III, have historically been included in the unit with maintenance employees.

III. FACTS

The bargaining unit is currently comprised of six employees in three job classifications: four HVAC Mechanics, one General Maintenance Worker, and one Secretary III.

As noted above, various secretary positions, referred to as Secretary I, Secretary II, and Secretary III, have been included in the bargaining unit and incorporated into the wage schedules of successive collective bargaining agreements since the Union signed its first contract with AMF in 2007. Secretary III Cecilia Farrell has held her position for nine years.¹ Her job duties primarily consist of answering the office phone, processing and logging work orders and purchase orders, and generating various reports for GSA or as requested by management. She reports to Travis Menchaca, Petitioner's Brownsville Project Manager. Prior to Petitioner assuming the contract, Farrell reported to QSI Project Manager Johnny Martinez.

The reports compiled by Farrell relate to matters such as the number and status of work orders, the number of hours worked, the status of fire alarm systems, and energy consumption. Farrell uses two computer systems in her work: CMMS, or Computerized Maintenance Management System, which is used for processing work orders and to which all employees have access; and Dynamics, which Farrell uses to process purchase orders. Other than information related to the purchase orders she processes, Farrell does not have access to company financial information.

As part of her job, Farrell attends periodic meetings between managers and GSA officials, during which work reports and the status of work orders are discussed. No disciplinary issues or other issues related to employees are discussed at these meetings.

¹ Farrell's initial job title under AMF was Secretary II. At some point under AFM she was promoted to Secretary III. This promotion carried a raise in pay but there were no substantial changes to her job duties.

Farrell has never had any role in the grievance process. She has never had access to Petitioner's disciplinary or investigative records. She has never been involved with contract negotiations or with the preparation of bargaining proposals. Nor has she ever assisted in the preparation of any work rules or policies.

Farrell's job duties have not changed in any material way since Petitioner succeeded QSI as the maintenance contractor for GSA in Brownsville.

IV. THE RELEVANT LEGAL STANDARDS AND ANALYSIS

A. Petitioner has failed to identify a recent, substantial change to justify upsetting the historical bargaining unit

As a threshold matter, Petitioner has failed to establish any change in conditions that would justify removing the Secretary III position from the existing bargaining unit.

It is well established that where a position or classification has historically been excluded from or included in the bargaining unit, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position or classification, regardless of when in the bargaining cycle the petition is filed. *Bethlehem Steel Corp.*, 329 NLRB 243, 244 (1999); *Union Electric Co.*, 217 NLRB 666, 667 (1975).

In the instant case, the Secretary I, II, and III positions have historically been included in the bargaining unit and incorporated in the wage tables negotiated by the parties in successive collective bargaining agreements since 2007. Petitioner has not pointed to any recent, substantial change in work duties or other circumstances related to the position that would justify removing the position from the unit.

B. The Secretary III is not a confidential employee

The party asserting confidential status has the burden of providing evidence to support its assertion. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987). Petitioner has failed to meet this burden.

"Confidential employees" are defined as employees who (1) share a confidential relationship with managers who "formulate, determine, and effectuate management policies in the field of labor relations," and (2) assist and act in a confidential capacity to such persons. *Waste Management de Puerto Rico*, 339 NLRB 262, 262 fn. 2 (2003); *Intermountain Electric Assn.*, 277 NLRB 1, 3-4 (1985); *Hampton Roads Maritime Assn.*, 178 NLRB 263, 264 (1969); *Ladish Co.*, 178 NLRB 90 (1969); *Eastern Camera & Photo Corp.*, 140 NLRB 569, 574-575 (1963). An employee who regularly substitutes for someone who has these duties also meets the definition. *Prince Gardner*, 231 NLRB 96, 97 (1977). "Formulate, determine, and effectuate" are assessed in the conjunctive. *Weyerhaeuser Corp.*, 173 NLRB 1170, 1172 (1968). This test is known as the "labor nexus" test and was endorsed by the Supreme Court in *NLRB v. Hendricks*

County Rural Electric Corp., 454 U.S. 170 (1981). Under this test, it is insufficient that an employee has occasional access to labor-related or personnel information. *Intermountain Electric Assn.*, 277 NLRB 1, 4 (1985); *Chrysler Corp.*, 173 NLRB 1046, 1048 (1968). The Board adheres “strictly” to this definition. *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956) (citing *Ford Motor Co.*, 66 NLRB 1317 (1946)).

As an alternative test, employees who have “regular” access to confidential information concerning anticipated changes that may result from collective-bargaining negotiations are deemed confidential employees. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987); *Pullman Standard Division of Pullman, Inc.*, 214 NLRB 762, 762–763 (1974). Compare *American Radiator & Standard Sanitary Corp.*, 119 NLRB 1715, 1720–1721 (1958) (employee had no way of knowing from statistical data he prepared what labor policy proposals might result). The Supreme Court has also approved of this alternative test. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 188–189 (1981). Thus, an employee who has access to confidential matters dealing with contract negotiations is a confidential employee (*Kieckhefer Container Co.*, 118 NLRB 950, 953 (1957)), but a clerk who prepares statistical data for use by an employer during contract negotiations is not confidential because the clerk cannot determine from the data prepared by him what policy proposals may result (*American Radiator & Standard Sanitary Corp.*, 119 NLRB 1715, 1720–1721 (1958)).

Employees who handle material dealing only with the financial matters of the employer are not confidential. *Dinkler-St. Charles Hotel, Inc.*, 124 NLRB 1302, 1304 (1959); *Brodart, Inc.*, 257 NLRB 380, 384 fn. 10 (1981). Similarly, the fact that some employees may be entrusted with business information to be withheld from their employer’s competitors or that their work may affect employees’ pay scales does not render such employees either confidential or managerial. *Swift & Co.*, 119 NLRB 1556, 1565 (1958). The Board has also held that the fact that an employee may, at some time in the future, function as a confidential employee does not warrant exclusion. *American Radiator & Standard Sanitary Corp.*, 119 NLRB 1715, 1719 (1958).

Assuming arguendo that the Project Manager “formulates, determines, and effectuates company policy in the field of labor relations,” the record does not establish that Farrell, in the Secretary III position, assists the Project Manager in a confidential capacity or has regular access to confidential information concerning labor relations or collective bargaining. The Board has consistently held that an employee will not be regarded as confidential merely by virtue of being a secretary to a person involved in the handling of grievances, or of his having access to labor relations data. 173 NLRB 1046, 1048, *supra* (citing 115 NLRB 722, 724, *supra*).

In sum, I find that Petitioner has failed to meet its burden of establishing that the Secretary III is a confidential employee.

V. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Petitioner is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union is a labor organization which claims to represent certain employees of the Employer.
4. The petition will be dismissed as indicated below.

VI. ORDER

IT IS HEREBY ORDERED that the petition is denied and dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board 14 days following the issuance of this Decision. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review. Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at Fort Worth, Texas, this 1st day of November, 2018.

/s/Timothy L. Watson
Timothy L. Watson
Regional Director
Region 16
National Labor Relations Board
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